Commonwealth of Massachusetts
State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 518

IN THE MATTER
OF
JAMES FLANAGAN

Appearances: Karen Gray, Esq.
Counsel for the Petitioner

William F. Sullivan, Esq.
Counsel for the Respondent

Commissioners: Brown, Ch., Burnes, Gleason, Larkin and McDonough

Presiding Officer: Commissioner Herbert P. Gleason, Esq.

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on April 6, 1995 by issuing an Order to Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR 1.01(5)(a). The OTSC alleged that Massachusetts Turnpike Authority ("MTA") employee James Flanagan ("Flanagan"), violated G.L. c. 268A, §3(b) by receiving certain gratuities from MTA contractors Middlesex Paving Corporation ("Middlesex") and Petruzzi & Forrester, Inc. ("Petruzzi & Forrester"). Specifically, the Petitioner alleged that Flanagan violated §3(b) by receiving from Middlesex, for himself and his guest, cocktails, dinner, entertainment and overnight hotel accommodations valued at $250 in connection with a 1992 Christmas party. The Petitioner also alleged that Flanagan violated §3(b) by: receiving from Petruzzi & Forrester a "free car"; and/or, by receiving from Petruzzi & Forrester a seven month $2,000 interest-free loan; and/or by accepting Petruzzi & Forrester's forgiveness of the $2,000 debt (owed by Flanagan for the car); and/or by receiving from Petruzzi & Forrester a discount of $50 or more on the fair market value of the car.

Flanagan filed his answer on May 17, 1995, admitting that he had attended a party and had accepted hotel accommodations paid for by Middlesex. In his answer, Flanagan also admitted that he had received a vehicle from Petruzzi & Forrester and that he had not paid the agreed upon price of $2,000 until November 5, 1993. Pre-hearing conferences were held in this matter on May 8, 1995, August 18, 1995, August 29, 1995, and October 12, 1995, with Commissioner Gleason presiding.[1/] At those conferences, procedural issues were discussed primarily focusing on discovery and scheduling, as well as the possibility of settlement.

An adjudicatory hearing in this matter and In re Petruzzi & Forrester (Docket No. 519) was held on two separate dates, October 30, 1995, and November 8, 1995. At the beginning of the hearing on October 30, 1995, the Petitioner sought to have the Commission recognize the Answers of the Respondents as part of the record of the adjudicatory proceeding. Likewise, the Petitioner requested that the previously filed "Stipulations and Agreements" concerning the Middlesex counts in the OTSC be included in the record for the proceeding. In addition, the Petitioner requested that the Commission take "administrative notice" of a disposition agreement previously entered into by Middlesex. Respondent

Flanagan objected on the basis of relevancy. The Presiding Officer took notice of the Disposition Agreement noting Respondent's objection.[2/]

At the conclusion of evidence, the parties were invited to submit legal briefs to the full Commission. 930 CMR 1.01(9)(k). The Petitioner and Respondent submitted briefs on December 11, 1995.

The parties were also invited to present their closing arguments before the full Commission. 930 CMR 1.01(9)(e)(5). Closing arguments were heard on December 13, 1995. The Petitioner and the Respondent each presented closing arguments at that time. Deliberations began in executive session on that date. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1). Deliberations were concluded on January 17, 1996.

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties, including the hearing transcript.[3/]

II. Findings

A. Jurisdiction

Flanagan does not contest the fact that at times relevant to the allegations of the OTSC, he was a "state employee" within the meaning of G.L. c. 268A, §'3(b) and 23(b)(3).

B. Findings of Fact

The Commission finds the following facts, which have been stipulated to by the parties, in relation to those charges involving Middlesex:

1. At all times here relevant, the MTA employed Flanagan as an assistant division engineer. As such, Flanagan was a state employee as that term is defined in G.L. c. 268A, §1.

2. Middlesex is a group of affiliated companies doing business in Massachusetts. Middlesex performs a variety of construction services including road maintenance and street paving. A substantial portion of Middlesex's business consists of state contracts.

3. Prior to and throughout 1992, as an MTA assistant division engineer, Flanagan supervised and inspected work performed by state contractors, including Middlesex. Moreover, as of late 1992, it was likely that Flanagan would supervise and inspect Middlesex contracts in the future.

4. In 1992, Middlesex had MTA contracts valued at over $400,000.

5. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

6. Flanagan and his guest attended the Middlesex party and stayed overnight at the Boston Harbor Hotel as Middlesex's guests. The cost to Middlesex was approximately $250.

The Commission finds the following facts in relation to the charges involving Petruzzi & Forrester:

7. From 1979 until March 29, 1993, the MTA employed Flanagan as an Assistant Division Engineer. From March 29, 1993, until August of 1994, when his employment was terminated, Flanagan was employed by the MTA in the position of Construction Inspector.

8. MTA Assistant Division Engineers direct and participate in the monitoring of contractors and the inspection of construction projects to assure that plans and specifications are being properly implemented. Responsibilities for the position include the preparation of records involving the recording of total quantities, payments and work performed.[4/]

9. MTA Construction Inspectors monitor the activities of construction contractors to assure that plans and

specifications are adhered to. Responsibilities for the position include measuring quantities of materials and maintaining a daily record of activities.[5/]

10. MTA Assistant Division Engineers and Construction Inspectors, in carrying out their responsibilities, exercise discretion and make decisions which affect the financial interests of the MTA contractors whom they are overseeing.[6/]

11. Petruzzi & Forrester is a construction company doing business in Massachusetts. Petruzzi & Forrester have previously provided construction services to the MTA.

12. Prior to 1992, Petruzzi & Forrester were awarded two MTA construction contracts. Petruzzi & Forrester also served as a sub-contractor with regard to an MTA paving contract.

13. Flanagan served as the Assistant Division Engineer with regard to a construction project at Turnpike Interchange 11A, which was completed during the early summer of 1990. Subsequently, Flanagan served as the Assistant Division Engineer with regard to a construction project at the Turnpike Interchange 9 toll plaza during the summer and fall of 1990. During 1990, Flanagan also served as the Assistant Division Engineer with regard to a paving project at Turnpike Interchange 9. With regard to each of the foregoing projects, Flanagan admitted that he supervised the work of Petruzzi & Forrester.

14. On December 12, 1992, the MTA awarded Petruzzi & Forrester a rock excavation contract (#851-426) valued at approximately one million dollars.

15. With regard to MTA contract #851-426, during the period of December 12, 1992, through March of 1993, Flanagan held the title of Assistant Division Engineer but performed the functions of an "office engineer".

16. Flanagan's functions with regard to MTA contract #851-426 included assembling shop drawings, using quality control ledger numbers to prepare pay estimates and investigating extra work orders.

17. A document entitled "Preconstruction Conference",[7/] which was prepared in the normal course of an MTA construction project, indicates that Flanagan's role in relation to MTA contract #851-426 would be limited to assembling and reviewing shop drawings. However, in preparing pay estimates for the contract, Flanagan was in a position to question and verify measurements which were supplied to him by the project inspector, Kevin Moriarty.[8/]

18. With regard to MTA contract #851-426, Flanagan participated in the review of an extra work order, resulting in a payment to Petruzzi & Forrester of an additional $16,000, and in the resolution of a controversy concerning the bid specifications.[9/]

19. In late March of 1993, Flanagan approached Petruzzi and informed him that he was interested in purchasing a car owned by Petruzzi & Forrester. The car, a 1989 Oldsmobile Cutlass Ciera with 119,000 miles, had been previously used by a Petruzzi & Forrester employee who no longer worked for the company.

20. Flanagan approached Petruzzi & Forrester concerning the purchase of the car while he was acting as the Assistant Division Engineer on contract #851-426 and was therefore in a position to take official actions which could affect the interests of Petruzzi & Forrester.[10/]

21. Prior to April 6, 1993, Petruzzi & Forrester contacted Brookfield Motors and received an oral (by telephone) estimate as to the value of the car.[11/] Brookfield Motors did not inspect the car in connection with its oral estimate of the car's value.

22. Although the car was not on the market, Petruzzi & Forrester agreed to sell it to Flanagan for $2,000 after receiving the oral estimate from Brookfield Motors.

23. On April 6, 1993, Flanagan and Petruzzi & Forrester signed a bill of sale which stated that Flanagan had paid and delivered $2,000 to Petruzzi & Forester for the car.

24. On April 22, 1993, Flanagan registered the car in his name. On or about May 7, 1993, Flanagan dropped off to Petruzzi & Forrester the license plates that were left on the car when Flanagan took possession of it. The

Massachusetts Registry of Motor Vehicles acknowledged receipt of the Petruzzi & Forrester license plates on May 11, 1993.[12/]

25. Flanagan paid $215 in sales tax to the Massachusetts Registry of Motor Vehicles as a result of his purchase of the vehicle.

26. Between April 6, 1993, and November 5, 1993, Flanagan did not make payment of the agreed upon $2,000 purchase price. During the same period, Petruzzi & Forrester did not pursue payment for the car.

27. Petruzzi & Forrester understood that Flanagan could not and, therefore, would not pay for the vehicle on April 6, 1993. In addition, Forrester understood that Flanagan would pay for the vehicle some time after April 6, 1993, but he did not know when.[13/]

28. Forrester understood that Flanagan had an obligation to pay $2,000 for the car and he always intended for Flanagan to pay that debt.[14/]

29. Subsequent to April 6, 1993, Forrester put a folder containing information on the sale of the car in his "suspense file".[15/] Because the time period following the transfer of the vehicle was Petruzzi & Forrester's "busy season", however, Forrester never looked in that file between April and November of 1993. Moreover, Forrester failed to follow up on the outstanding $2,000 debt owed by Flanagan because of the fact that he alone ran the office for Petruzzi & Forrester without any support staff.[16/]

30. At all times prior to November 5, 1993, Flanagan intended to pay Petruzzi & Forrester $2,000 for the vehicle.[17/]

31. On November 2, 1993, Massachusetts State Police Officer Walter Carlson went to the offices of Petruzzi & Forrester to inquire about Petruzzi & Forrester's sale of the car to Flanagan. Immediately thereafter Petruzzi & Forrester telephoned Flanagan to inform him of the State Police investigation.

32. On November 5, 1993, Flanagan paid Petruzzi & Forrester $2,000 for the car.

33. Between 4/26/93 and 10/5/94, Flanagan paid a total of $3,322.90 for repairs to the vehicle involving the battery, tires, starter, steering, hoses, transmission, ignition and brakes.[18/]

34. Flanagan's relationship with Petruzzi & Forrester was based solely on his official interaction with them as an MTA employee.[19/]

35. Flanagan did not file a written disclosure with his MTA appointing authority of his purchase of an automobile from Petruzzi & Forrester.[20/]

III. Decision

The Petitioner contends that Flanagan violated G.L. c. 268A, §3(b) with regard to his receipt of several gratuities. This section prohibits anyone, being a present or former state, county or municipal employee or member of the judiciary, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly, asking, demanding, exacting, soliciting, seeking, accepting, receiving or agreeing to receive anything of substantial value for himself for or because of any official act or acts within his official responsibility performed or to be performed by such an employee.

The term "substantial value" is not defined in G.L. c. 268A. In construing this term, both the courts and the Commission have established a $50 threshold at which and above, a gift will be regarded as of substantial value. *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1986) (a gift of $50 would be considered substantial within the context of §3(b)); *Commission Advisory No. 8 (Free Passes) (1985); EC-COI-93-14* (re-affirming Commission's use of $50 threshold in measuring substantial value). The Commission has not limited its application of §3 and the $50 threshold to cash gifts. Rather the Commission has found tickets, meals, loans (*In re Antonelli*, 1982 SEC 101) and transportation valued at $50 or more to be of substantial value. In contrast, gifts, discounts or meals worth less than $50 have been treated as of nominal value. *In re Michael*, 1981 SEC 59.

The Commission has previously found a §3 violation where gifts and other things of substantial value are given "for or because of" the employee's official acts[21/] even where there is no understood "quid pro quo" or intent to influence the employee's acts. The Commission examines the relationship between the gratuity and the employee's official duties. The Commission has previously explained that

[a] public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of Section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple enumeration for doing what employees are already obliged to do - a good job. Sound public policy necessitates a flat prohibition since the alternative would present unworkable burdens of proof. It would be nearly impossible to prove the loss of an employee's objectivity or to assign a motivation to his exercise of discretion. See *Michael*, 1981 SEC 59, 68.

In its *Free Passes* Advisory, the Commission announced that the application of §3 is not limited to instances in which matters are actually pending before a public official, but includes prior or future official acts as well. The Commission created a policy whereby it will infer a "for or because of" relationship between the gift and the recipient where there is no prior social or business relationship between the giver and the receiver, and where the recipient is in a position to use his authority in a manner which could affect the giver.

A. Middlesex

The Petitioner alleges that by accepting gratuities valued at approximately $250 from Middlesex in the form of a party and overnight hotel accommodations, Flanagan violated G.L. c. 268A, §3(b).

Based on the foregoing agreed upon facts, there is no dispute that Flanagan attended the December 19, 1992, Christmas party, which included cocktails, dinner, entertainment and overnight hotel accommodations at the Marriott Long Wharf Hotel in Boston. It was agreed by the parties that the explicit purpose of the party was to foster good will with employees and individuals doing business with Middlesex. Prior to and throughout 1992, Flanagan supervised and inspected work performed by Middlesex. Furthermore, as of late 1992, it was likely that Flanagan would supervise and inspect Middlesex contracts in the future. We therefore conclude that Flanagan was in a position to use his authority in a manner which could affect Middlesex. As a result, the Petitioner has proven by a preponderance of the evidence that Flanagan received something of substantial value from Middlesex for or because of officials acts performed or to be performed. Flanagan thereby violated §3(b) of G.L. c. 268A.

B. Petruzzi & Forrester

1. Section 3(b)

The Petitioner alleges that by not paying Petruzzi & Forrester $2,000 for an automobile after he had taken possession of it, Flanagan received something of substantial value because he:

a) accepted a "free car"; or

b) knew and had accepted the fact that Petruzzi & Forrester had forgiven the $2,000 debt; or

c) had accepted from Petruzzi & Forrester an interest free loan of $2,000 for seven months; or

d) had accepted from Petruzzi & Forrester a discount of $50 or more on the fair market value of the car.

a. ***Gift of a Car***

The parties agree that Flanagan received from Petruzzi & Forrester a 1989 Oldsmobile Cutlass Ciera with 119,000 miles on April 6, 1993. It is undisputed that Flanagan paid to Petruzzi & Forrester $2,000, the agreed upon sales price, on November 5, 1993. Thus, the Commission does not find that Flanagan received from Petruzzi & Forrester a "free car".

b. ***Forgiveness of Debt***

The Petitioner contends that Flanagan received from Petruzzi & Forrester something of substantial value because he was aware of and had accepted the fact that the debt owed for the vehicle had been forgiven prior to the State Police investigation. In other words, the Petitioner would have us find that had the State Police not investigated the transaction, Petruzzi & Forrester would not have required Flanagan to pay the $2,000 debt.

On this point, the Commission finds that the Petitioner has presented no direct evidence to demonstrate that Petruzzi & Forrester had at any time forgiven the $2,000 debt. Based on the most obvious evidence, the fact that Petruzzi & Forrester eventually notified Flanagan of the outstanding obligation (albeit after the State Police investigation) and the fact that Flanagan eventually paid the previously agreed upon purchase price of $2,000, we conclude that Petruzzi & Forrester did not forgive the debt. Moreover, even if we consider the Petitioner's theory that, but for the State Police investigation, Petruzzi & Forrester had already treated and would continue to treat Flanagan's debt as forgiven, we do not find that the theory is supported by any direct evidence. Flanagan testified that, at all times after receiving the car, he intended to pay the $2,000. Mr. Forrester also testified that there was no doubt in his mind that Flanagan was under an obligation to pay the $2,000 agreed upon price. Thus, the only two parties who could give definitive testimony with regard to the terms of the transaction provided testimony in contradiction to the Petitioner's allegation that the debt had been forgiven.

Further, we find that the circumstantial evidence put forth by the Petitioner does not permit us to draw a reasonable inference that Petruzzi & Forrester had forgiven the $2,000 debt. In particular, the Petitioner has proven by undisputed evidence the passage of a seven-month time period following the receipt of the car and before the payment of $2,000 was made. Moreover, the Petitioner established that the payment occurred only after a state police investigation concerning the car's transfer had commenced.

In response, however, Petruzzi & Forrester argue that they understood that Flanagan would not and could not pay for the vehicle on April 6, 1993. Forrester testified that it was his understanding that Flanagan would be paying for the car some time later. We have credited Forrester's testimony that he put a folder containing information on the sale of the car in his "suspense file", but that because of time of year (their busy season), he never looked in that file between April and November of 1993. Moreover, Forrester explained that his failure to follow up on Flanagan's payment resulted from the small size of their office.

In summary, the Petitioner's allegation that the debt was forgiven by Petruzzi & Forrester is supported, at best, by circumstantial evidence. However, we find Forrester's explanation concerning his failure to collect the debt during the seven month period credible. This explanation rebuts the Petitioner's circumstantial evidence. We, therefore, conclude that the Petitioner has not proven by a preponderance of the evidence that the debt was forgiven.

c. ***Interest Free Loan***

The Petitioner alleged that, even if Flanagan intended eventually to pay for the car, Flanagan received from Petruzzi & Forrester an interest free loan of $2,000 for seven months. However, we find that Petitioner failed to meet its evidentiary burden concerning the value of the alleged loan, the type of loan provided, the prevailing interest rate for an automobile loan at the relevant time, etc. Because we cannot make such determinations without evidence before us, we cannot reasonably conclude that Flanagan accepted from Petruzzi & Forrester something of substantial value in the nature of an interest free loan.

d. ***Discount***

The Petitioner further alleged that Flanagan accepted from Petruzzi & Forrester a discount of $50 or more on the fair market value of the vehicle. We find that the record is devoid of clear and reliable direct evidence demonstrating that the fair market value of the vehicle was $2,050 or greater.[22/]

The Petitioner relies on circumstantial evidence as to the vehicle's fair market value. In particular, the Petitioner put forth the amount of sales tax ($215) paid by Flanagan to the Registry of Motor Vehicles on his purchase of the vehicle. Petitioner argues that the Commission may draw an inference from this evidence that, assuming a sales tax rate of 5%, the Registry believed the value of the car to be $4,300. However, the Petitioner presented no testimony or

documentary evidence as to how the Registry assesses the value of a vehicle for sales tax purposes. Forrester testified that, based on his own inquiry of the Registry, that agency uses a computer generated value which does not take into account the condition or mileage of the vehicle. The owner of the vehicle may file for an abatement if, due to the condition of the car, the actual value is believed to be less than that which is assigned to the vehicle by the Registry.[23/] Because there was no evidence as to how the Registry's values are arrived at, we cannot reasonably draw an inference as to the fair market value of the vehicle based on the Registry's collection a $215 sales tax.

In response to the Petitioner's allegation, Petruzzi & Forrester contends that the $2,000 price paid for the car reasonably reflected the fair market value of the vehicle. In support thereof Petruzzi & Forrester submitted the NADA Official Used Car Guide for May, 1993, to demonstrate that a high mileage deduction of $2,500 would be applicable to a 1989 intermediate or personal luxury car with 115,000 to 130,000 miles.[24/] There was not, however, any testimony or other evidence to demonstrate how this guide could be used to assess the actual or fair market value of the car in question.[25/] Additionally, Flanagan submitted repair bills for the vehicle which he incurred between 4/26/93 and 10/5/94 totalling $3,322.90. Finally, Petruzzi & Forrester presented evidence that the depreciated "value of the car", as shown on Petruzzi & Forrester's 1993 tax return, was $1,818. As a result, the company reported a taxable gain of $182 on the sale. There was no testimony as to how the amount of depreciation was calculated, although the tax return was prepared by a Certified Public Accountant.

We therefore find that the Petitioner has not put forth sufficient direct evidence to prove that the fair market value of the vehicle exceeded $2,000. Moreover, we do not find the circumstantial evidence sufficiently clear or reliable so as to permit us to draw an inference as to the vehicle's fair market value.[26/] As a result, we conclude that the Petitioner has not proven by a preponderance of the evidence that Flanagan received a discount of $50 or more on the fair market value of the vehicle.

Because we conclude that the substantial value element of a §3(b) has not been proven with regard to any of the Petitioner's allegations concerning the car, we do not reach the question: was Flanagan, immediately prior to the transfer of the vehicle, in a position to use his authority to affect Petruzzi & Forrester so that a gift to him would violate §3(a). We note, however, that we do not find persuasive, Flanagan's argument that because he was not in a position to give final approval to the pay estimates, he was not in a position to take actions which affected Petruzzi & Forrester. Moreover, Dionne testified that there was a likelihood that Flanagan could have been assigned to a Petruzzi & Forrester contract in the future, after the transfer of the vehicle. Finally, Flanagan testified that he had not been instructed by his MTA supervisors that he was never again to work on a Petruzzi & Forrester project.

2. Section 23(b)(3)

Petitioner alleges that by failing to pay the $2,000 for the car to Petruzzi & Forrester, with whom he had dealings in his official capacity as an MTA employee, until the state police made inquiries about the matter seven months after he took possession of the car, Flanagan violated §23(b)(3). The Petitioner argues that Flanagan thereby acted in a manner which would cause a reasonable person knowing the relevant circumstances to conclude that Petruzzi & Forrester could unduly enjoy Flanagan's favor in the performance of his official duties.

Section 23(b)(3) of G.L. c. 268A provides that

[n]o current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

We have previously recognized the inherently exploitable nature of public employees entering into private business relationships with those under their jurisdiction. The Commission has emphasized that:

public officials and employees must avoid entering into private commercial relationships with people they regulate in their public capacities. In the Commission's view, the reason for this prohibition is two-fold. First, such conduct

raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cutbacks are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee or another person who does not enjoy such a relationship. At least the appearance of favoritism becomes unavoidable. Second such conduct has the potential for serious abuse. Vendors and subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains. *In re Keverian, supra,* 462.

In applying §23(b)(3), the Commission will evaluate whether the public employee is poised to act in his official capacity and whether, due to his private relationship or interest, an appearance arises that the integrity of the public official's action might be undermined by the relationship or interest.

In the case before us, we could reasonably find that Flanagan "acted in a manner . . . ," within the meaning of §23(b)(3), if he performed his MTA job responsibilities on the Petruzzi & Forrester rock excavation contract while discussing with Petruzzi & Forrester his interest in purchasing their car. Whereas, if Flanagan approached Petruzzi & Forrester concerning the purchase of the vehicle only after his official relationship with them had ended (after having been transferred to a job involving another contractor), then he could not act in a manner which would cause a reasonable person to conclude that he would be unduly influenced in the performance of his duties.

On this point, we find that Flanagan was performing his MTA job responsibilities with regard to a Petruzzi & Forrester project at that same time that he approached Petruzzi & Forrester concerning his interest in purchasing their automobile. Therefore, by a preponderance of the evidence, we find that a reasonable person could conclude that the integrity of any actions taken by Flanagan in his MTA position regarding the rock excavation contract, while simultaneously negotiating the purchase of the car with Petruzzi & Forrester, could be undermined by his private dealings with Petruzzi & Forrester concerning the car.

This analysis of §23(b)(3) is consistent with our prior application of this section. The Commission has previously held that "acting in a manner" refers to the taking of official action as a public employee. See *EC-COI-89-9* (member of General Court advised after conveying interest in company to his wife that prior to his *legislative participation* in matters involving clients of the company, he should publicly disclose the relevant facts); *89-16* (a member of a state Board must disclose his prior friendship with petitioner prior to acting on petition pending before the Board); *89-29* (Steamship Authority employee made 23(b)(3) disclosure prior to participating in Authority decision concerning sale of land that Authority had previously purchased from his private client).

Finally, we note that in order to avoid a violation in circumstances such as those before us, §23(b)(3) requires a public employee to file a written disclosure with his appointing authority describing the public employee's private business relationship with someone whom the employee regulates. See *EC-COI-92-7* citing *In re Keverian*, 1990 SEC 460 (Speaker of the House admitted that private business relationships with office employees and vendors, without disclosure, violate §23(b)(3)); *In re Garvey*, 1990 SEC 478. In this case, Flanagan did not file any written disclosure with his MTA appointing authority concerning his purchase of the car from Petruzzi & Forrester.[27/] Flanagan therefore violated §23(b)(3) of G.L. c. 268A.

IV. Conclusion

In conclusion, the Petitioner has proven by a preponderance of the evidence that Flanagan violated §3(b) by receiving from Middlesex something of substantial value for or because of official acts performed or to be performed. We further conclude that the Petitioner has not proven by a preponderance of the evidence that Flanagan received from Petruzzi & Forrester something of substantial value and therefore he did not violate §3(b) in relation to the motor vehicle transaction. We do, however, conclude that the Petitioner has proven by a preponderance of the evidence that Flanagan violated §23(b)(3) in relation to his purchase of an automobile from Petruzzi & Forrester.

V. Order

The Middlesex Gratuities

Pursuant to the authority granted it by G.L. c. 268B, §4(j),[28/] the Commission hereby orders James Flanagan to pay a civil penalty of $750 (seven hundred and fifty dollars) to the Commission within thirty days of his receipt of this

Decision and Order for receiving gratuities for himself and his guest from Middlesex in violation of G.L. c. 268A, §3(b). This penalty is consistent with the penalties paid by other public employees who attended the above-described Middlesex event without paying for it. See e.g., *In re O'Toole*, 1994 SEC 698; *In re Berlucchi*, 1994 SEC 700; *In re Salamanca*, 1994 SEC 702.

The Car From Petruzzi & Forrester

Although the Commission has found that Flanagan violated §23(b)(3) in relation to his purchase of a motor vehicle from Petruzzi & Forrester, we choose not to assess a civil penalty for this violation. In reaching this decision, we have considered several factors. We note that, as early as April of 1993, Flanagan's MTA superiors were aware of his private transaction with Petruzzi & Forrester and that Flanagan did not attempt to hide his purchase of the vehicle. Additionally, Flanagan was terminated from his MTA position, at least in part, because of his purchase of the automobile from Petruzzi & Forrester.

Our decision not to impose a penalty with regard to the §23(b)(3) violation in this case is also based on our prior practice of imposing penalties only in those §23(b)(3) cases where there has been a pattern of violative conduct or where the conduct has been considered particularly egregious. See e.g., *In re Doughty*, 1995 SEC 726; *In re Malcolm*, 1991 SEC 535. We find that this matter does not involve that type of §23(b)(3) violation.

DATE: January 17, 1996

[1/] Commissioner Gleason was duly designated as the presiding officer in this proceeding. See G.L. c. 268B, §4(e).

[2/] At the conclusion of testimony on November 8, 1995, the presiding officer noted that the previously noticed Disposition Agreement would be recognized as a record of the Commission, but that the findings contained therein would not be considered by the Commission in reaching a decision on this matter. Rather, the Commission would apply its prior precedent to its factual findings in the current case. With regard to the particular allegations involving Middlesex, the parties agreed that they would rest on the previously filed Stipulations and Agreements.

[3/] Commissioner Gleason is not a signatory to the Decision because his term ended prior to its issuance. He did, however, fully participate in the Commission's deliberations and decision in this matter.

[4/] This finding is derived from a written job description for the position of MTA Assistant Division Engineer which was admitted in evidence.

[5/] This finding is derived from a written job description for the position of MTA Construction Inspector which was admitted in evidence. MTA inspector Kevin Moriarty's testimony concerning his job responsibilities further supports this finding. Flanagan's testimony concerning his role as a Construction Inspector also supports this finding.

[6/] This finding is supported by the testimony of Ronald Dionne, MTA Division Engineer. Although on cross-examination, Mr. Dionne was challenged as to the extent of Flanagan's responsibility with regard to a particular contract involving Petruzzi & Forrester, we find Dionne credible as to the general job responsibilities for the two MTA positions. Moreover, this finding is supported by written job descriptions for the two positions which were admitted in evidence.

[7/] This document was admitted in evidence.

[8/] This finding is supported by the testimony of Ronald Dionne. Although Dionne admitted on cross-examination that Flanagan did not give the final approval with regard to pay estimates or extra work orders, we find Dionne credible with regard to the actual role played by Flanagan on contract #851-426. We note that Flanagan admitted preparing the pay estimates.

[9/] This finding is supported by Ronald Dionne's testimony which we find credible.

[10/] This finding is supported by a letter from Spencer Savings Bank dated March 24, 1993, which was admitted in evidence and which responds to an inquiry by Petruzzi & Forrester concerning its intention to sell the vehicle in question. Furthermore a letter dated March 22, 1993, from MTA Director of Human Resources, James LaBua, notified Flanagan that he would be reclassified to the position of Construction Inspector effective March 29, 1993. Therefore, we can reasonably find that Flanagan had approached Petruzzi & Forrester concerning the car prior to March 23, 1993, and at that time he continued to function as the Assistant Division Engineer with regard to a Petruzzi & Forrester contract. Moreover, there is no evidence to suggest to us that Flanagan worked on any project other than contract #851-426 during the month of March, 1993.

[11/] Forrester's testimony as to the value placed on the car by Brookfield Motors was unclear.

[12/] This finding is based on Flanagan's testimony and several Registry of Motor Vehicles documents including a Plate Return Receipt.

[13/] This finding is supported by the testimony of Forrester. We note that Forrester was challenged on cross-examination concerning his prior

understanding of when Flanagan would pay for the car. However, we find Forrester credible in that he understood payment would be made some time after April 6, 1993, and that the exact time for payment was not scheduled.

[14/] This finding is based on Forrester's testimony which we find credible.

[15/] The "suspense file" apparently was mechanism intended to work as a tickler system to remind Forrester of matters which would require his future attention.

[16/] We find Forrester's testimony concerning his failure to pursue payment from Flanagan due to other more pressing concerns credible.

[17/] This finding is based on Flanagan's testimony which we find credible. The Petitioner's introduction of evidence concerning Flanagan's financial status in 1993 does not prompt us to draw an inference contrary to this finding.

[18/] This finding is supported by the bills for these repairs which were admitted in evidence.

[19/] Flanagan testified that his relationship with Petruzzi & Forrester was purely business.

[20/] This finding is based on Flanagan's testimony during the adjudicatory hearing.

[21/] "Official act," any decision or action in a particular matter or in the enactment of legislation. G.L. c. 268A, §1(h).

[22/] As to the fair market value of the vehicle, Forrester testified that he received an oral estimate from Brookfield Motors (prior to April 6, 1993), which was based in part on a deduction for high mileage "somewhere in the neighborhood of $2,500." On cross examination, Forrester, claiming a lack of clear memory, put the Brookfield Motors statement of the high mileage deduction at "$2,900 or whatever. . . ." The testimony was unclear as to what value was actually placed on the car by Brookfield Motors. A written estimate from Brookfield Motors was admitted in evidence. The written estimate, prepared by Sales Representative Troy D. Kruzewski, was provided to Forrester in May of 1994 (more than one year after the transaction) and states that the "average loan" using "April's NADA official used card guide" is $2,075 which includes a mileage deduction of $2,200. However, we do not credit the written estimate as reliable where there was no evidence, other than the document itself, as to how it was prepared or what the meaning of the term "average loan" is and how it relates to the fair market value of a used vehicle.

[23/] There was no evidence as to whether Flanagan ever attempted to obtain an abatement and if he did not, the reason for that decision.

[24/] A review of the record indicates that the document was admitted solely for the purpose of demonstrating a mileage deduction as opposed to the value of the vehicle in question.

[25/] Because the car was not sufficiently identified, we are unable to determine which of several values provided by the Guide would be applicable to the car in question.

[26/] For example, there was no expert testimony as to the fair market value of a 1989 Oldsmobile Cutlass Ciera with 119,000 miles.

[27/] We note that there was testimony that in April of 1993, Dionne (Flanagan's immediate supervisor) was aware that Flanagan had received the car from Petruzzi & Forrester. At some point during April of 1993, Dionne reported the transaction to his superior, Chief Engineer Bruce Grimaldi. Furthermore, Dionne testified that he was instructed by Grimaldi to do nothing further in connection with the car transfer. MTA Director of Operations, John Judge testified that he became aware of the automobile transaction at some time in September of 1993.

[28/] The Commission possesses the authority under G.L. c. 268B, §4(j) to assess civil penalties of not more than two thousand dollars for each violation of G.L. c. 268A.